

(ii) There is an emergency which will not permit the time necessary to conduct competitive negotiations, or

(iii) After solicitation of a number of sources, competition is determined inadequate.

(2) The contracting agency shall comply with the following procedures for noncompetitive negotiations:

(i) Establish a process to determine when noncompetitive negotiation will be used,

(ii) Develop an adequate scope of work, evaluation factors and cost estimate as required in paragraph (a)(1) of this section,

(iii) Conduct negotiations as required in paragraph (a)(4) of this section, and

(iv) Submit the proposed contract and cost estimate to the FHWA for approval.

§ 172.9 Compensation.

(a) Contracting agencies may establish cost principles for determining the reasonableness and allowability of costs. Federal reimbursement shall be limited to the Federal share of the costs allowable under the cost principles in 48 CFR part 31 (Federal Acquisition Regulations). Any references included in 48 CFR part 31 to other parts of 48 CFR do not apply to these contracts.

(b) Applicable cost principles shall be referenced in each contractual document.

(c) *Methods of payment.* (1) The method of payment to compensate the consultant for all work required shall be set forth in the original contract and in any contract modifications thereto. It may be a single method for all work or may involve different methods for different elements of work. The methods of payment which shall be used are: lump sum, cost plus fixed fee, cost per unit of work or specific rates of compensation.

(2) Compensation based on cost plus a percentage of cost or percentage of construction cost shall not be used.

(3) When the method of payment is other than a lump sum, the contract shall specify a maximum amount payable which shall not be exceeded unless adjusted by a contract modification.

(4) The lump sum method shall not be used to compensate a consultant for

construction engineering and inspection services except when the agency has established the extent, scope, complexity, character and duration of the work to be required to a degree that fair and reasonable compensation including a fixed fee can be determined.

(d) *Fixed fees.* (1) The determination of the amount of the fixed fee shall take into account the size, complexity, duration, and degree of risk involved in the work. The establishment of the fixed fee shall be project specific.

(2) Fixed fees normally range from 6 to 15 percent of the total direct and indirect cost. Subject to the approval of the FHWA, a fixed fee over 15 percent may be justified when exceptional circumstances exist.

§ 172.11 Contract modifications.

(a) Contract modifications are required for any modification in the terms of the original contract that change the cost of the contract; significantly change the character, scope, complexity, or duration of the work; or significantly change the conditions under which the work is required to be performed.

(b) A contract modification shall clearly outline the changes made and determine a method of compensation. FHWA approval of contract modifications shall be obtained prior to beginning the work except as discussed in paragraph (d) of this section.

(c) Overruns in the costs of the work shall not warrant an increase in the fixed fee portion of a cost plus fixed fee contract. Significant changes to the Scope of Work may require adjustment of the fixed fee portion in a cost plus fixed fee contract or in a lump sum contract.

(d) In unusual circumstances, the consultant may be authorized to proceed with work prior to agreement on the amount of compensation and execution of the contract modification, provided the FHWA has previously approved the work and has concurred that additional compensation is warranted.

§ 172.13 Monitoring the contract work.

(a) A public employee qualified to ensure that the work being pursued is complete, accurate and consistent with

the terms, conditions, and specifications of the contract shall be in responsible charge of each contract or project. The employee's responsibilities include:

(1) Scheduling and attending progress meetings with the consultant and being involved in decisions leading to change orders or supplemental agreements,

(2) Being familiar with the qualifications and responsibilities of the consultant's staff,

(3) Visiting the project and/or consultant's offices on a frequency that is commensurate with the magnitude, complexity and type of work. This includes being aware of the day-to-day operations for Construction Engineering Service contracts, and

(4) Assuring that costs billed are consistent with the acceptability and progress of the consultant's work.

(b) A final performance evaluation report, except for contracts awarded under small purchase procedures shall be prepared by the public employee in responsible charge of the contract and shall be submitted to the State highway agency's contracting office. The report should include, but not be limited to, an evaluation of such items as timely completion of work, conformance with contract cost and the quality of work. A copy of the report shall be sent to the firm for its review and/or comments and any written comments submitted to the contracting agency by the firm shall be attached to the final report.

(c) Contracting agencies should include a clause in engineering contracts requiring the consultant to perform such additional work as may be necessary to correct errors in the work required under the contract without undue delays and without additional cost to the owner. However, in general, a consultant should not be held responsible for additional costs in subsequent related construction resulting from errors or omissions which are not a result of gross negligence or carelessness.

§ 172.15 Alternate procedures.

(a) This is a process whereby the contracting agency can be authorized to substitute its contract review and approval actions for those of the FHWA.

Before a contracting agency can operate under the alternate procedures concept, it shall submit procedures to the FHWA that include the following:

(1) A formal request to operate under the alternate procedure concept.

(2) The written procedures, as required by § 172.5(b) of this part, it will follow, and

(3) A statement signed by the chief administrative officer of the contracting agency certifying that it will conform with its written procedures, the provisions of this regulation, and all applicable Federal and State laws and administrative requirements.

(b) The alternate procedures and all revisions shall be approved by the FHWA.

(c) The alternate procedures concept may apply to all Federal-aid highway funded contracts.

(d) A copy of the original executed contract and all contract modifications shall be submitted to the FHWA.

Subpart B—Private Sector Involvement Program

SOURCE: 59 FR 64848, Dec. 16, 1994, unless otherwise noted.

§ 172.21 Purpose and applicability.

(a) The purpose of this subpart is to implement a program to encourage States to contract for engineering and design services with the private sector whenever such contracts would be cost effective.

(b) This subpart applies to all engineering and design services contracts financed with Federal-aid highway funds.

§ 172.23 Evaluation and selection.

(a) When funds are appropriated for this program, the FHWA will invite States to submit applications to participate in the program. The FHWA will use the applications to make the program allocations under the program.

(b) The FHWA will make a comparison of the applicants based on the amount of Federal-aid highway funds each State has expended on contracts for engineering and design services. In assessing the amount of funds a State